might be made; and (b) he agreed that the terms of this policy could not be waived by any agent of the insurance company, and that any modification of the policy should not be valid unless indorsed thereon by the president or one of its secretaries.

"(2) The insured, James Getty, Jr., had knowledge, either actual or presumptive, that the agent of the defendant company, Mr. Scott, had no power to waive or modify any condition of the policy, including that provision of the policy which required prepayment of the premium before an accident.

"(3) The defendant's agent, Mr. Scott, could not bind his principal, the defendant, by waiving payment of the renewal premium when Getty, the insured, knew that he had no power to make such waiver.

"(4) It is immaterial whether Mr. Scott was a general agent or a subagent of the defendant company, so far as his right to waive any condition of the policy was concerned.

"(5) Where the contract of insurance expressly provides by its terms, the particular manner in which a condition of the contract may be waived or modified, no other attempted waiver will be permitted to modify the contract.

"(6) The mere delivery of the renewal receipt did not give the policy force, because, by its terms, it was expressly stipulated between the parties that it should not take effect unless the premium should be paid previous to an accident. The failure to pay the premium simply suspended the policy until the premium should be paid.

"(7) The possession by the plaintiff of the renewal receipt is merely presumptive evidence that the premium was paid, and is not binding upon the company, unless the jury find that the money was actually paid."

The court declined to charge as requested, but instructed the jury, inter alia, that:

"If you find from the evidence that it was the usual course of dealing between the defendant company and Mr. Scott, its general agent, for the company to charge Mr. Scott, as its debtor, for the premiums on policies of insurance, and on renewal receipts transmitted to him for delivery, and that in this particular instance the company, when it transmitted the renewal receipt of June 7, 1895, charged Mr. Scott as its debtor with the premium of $50, named in the receipt, then, for the purpose of this case, that premium must be regarded as paid to the company, as between the company and Mr. Getty, or his personal representatives, or cash payment thereof must be deemed to have been waived and the nonpayment of the premium by Getty to Scott under the circumstances would constitute no defense to this suit."

While the court so charged it nevertheless reserved the legal question raised by the points, whether the plaintiff is entitled to recover under the facts.

The jury rendered a verdict for the plaintiff below, as follows:

"The jury find for the plaintiff in the sum of ten thousand, five hundred and seventy-three and $^{83}/_{100}$ dollars, subject to the opinion of the court upon the question of law reserved—whether the nonpayment by Mr. Getty of the renewal premium mentioned in the renewal receipt of June 7, 1895, (pro ut) constitutes a defense to this action upon the facts established by the verdict, namely, that it was the usual course of dealing between the defendant company and Mr. Scott, its general agent, for the company to charge Mr. Scott as its debtor with the premiums on policies of the insurance and on renewal receipts transmitted to him for delivery, and that in this particular instance the company, when it transmitted the renewal receipt of June 7, 1895, charged Mr. Scott as its debtor with the premium of $50 named therein; and Mr. Scott having delivered the renewal receipt to Mr. Getty without requiring cash payment of the premium."

The court subsequently ruled the reserved question against the company, and ordered judgment accordingly. To this ruling the company excepted,—as it had done to the admission of some testimony produced to prove payment,—and brought the case here,

assigning numerous alleged errors. A separate consideration of these assignments is unnecessary. The first, which is to the part of the charge above quoted, covers the entire complaint, except as respects the admission of testimony, mentioned.

As the court below said when considering the question reserved, "the verdict of the jury establishes that it was the usual course of dealing between the company and its agent, Mr. Scott, for the company to charge Scott as its debtor with the premium on policies of insurance and on renewal receipts transmitted to him for delivery, and that in this particular instance the company when it transmitted the renewal receipt of June 7, 1895, charged Mr. Scott as its debtor with the premium of $50 named in the receipt. The question of law reserved is whether under the circumstances the fact that the renewal premium was not actually paid by Getty to the company constitutes a defense." And this is the main question raised by the assignments of error. If it was new, difficulty might be found in answering it. It is not new, however. It was involved in Miller v. Insurance Co., 12 Wall. 285; Elkins v. Insurance Co., 113 Pa. St. 386 [6 Atl. 224]; Insurance Co. v. Carter (Pa. Sup.) 11 Atl. 102; Insurance Co. v. Hoover, 113 Pa. St. 591 [8 Atl. 163]; and numerous other cases which need not be cited. It is urged, however, on behalf of the plaintiff here, that Miller v. Insurance Co. is distinguishable from the case before us, and that all the other cases cited, which followed it, were decided under a misapprehension of that case. The only distinction pointed out consists in the fact that the Brooklyn Company instructed its agents that if they delivered policies without exacting prepayment of premiums as the policies required, they would be charged with and held responsible for the amount. It is difficult to see the importance of this fact. The instruction was a caution, simply, to the agents, who would have been as clearly responsible for such premiums without it. The delivery of the policies under the circumstances would be a violation of duty, and would necessarily render the agents liable for the premiums. The caution did not therefore affect their obligations to the company. The court thought it tended, with other circumstances named, to support an inference of authority to deliver policies without exacting prepayment. This may be so; but its tendency in that direction is certainly no greater than is the charge, itself, against the agents, on forwarding policies for delivery. What the case decides is correctly stated in the syllabus, as follows:

"Where an insurance company instructed its agents not to deliver policies until the whole premiums are paid, 'as the same will stand charged to their accounts until the premiums are received,' and the agent did nevertheless deliver a policy, giving a credit to the insurer and waiving a cash payment, * * * the company was bound."

Under the circumstances of that case, and of the one before us, the charge against the agent and delivery of the policy, or premium receipt, to the assured may be treated as a transfer of the assured's indebtedness to the agent, and consequently a payment as between the former and the company; or as an estoppel of the company

against setting up the stipulation for prepayment of the premium in avoidance of the policy. We are not called on to consider the reasonableness of this rule; it has become a part of the law of insurance. Companies can avoid it by avoiding the facts on which it rests, but in no other way.

The exceptions taken to the admission of evidence cannot be sustained. The evidence was competent to prove payment, under the circumstances shown, and the rule above stated.

The judgment is therefore affirmed.

CHEW v. LOUCHHEIM et al.

(Circuit Court of Appeals, Third Circuit. April 23, 1897.)

No. 24.

1. CONVERSION—EVIDENCE.

Plaintiff ordered certain brokers to purchase a specified number of shares in a corporation, and gave them money to partly pay for them. The brokers made written reports that they had purchased the stock, and afterwards repeatedly declared that they were holding it for plaintiff, and had received dividends thereon for him. They also accepted from him several payments on a balance due therefor. *Held* that, in view of the fact that in the common course of dealing certificates accompany the purchase of stock, and are the usual and only evidence of purchase and transfer of title, the above circumstances were sufficient to warrant the jury, in a suit for conversion by the brokers, in finding that they actually had possession of such certificates at the time of the alleged conversion.

2. SAME.

Where brokers hold stocks and bonds purchased through them by a customer for investment, awaiting payment by him of a balance due, with an express contract that they are not to transfer them to others, their possession is that of bailees, and a pledge thereof by them for their own benefit, or an assignment in payment of their creditors, is a conversion for which trover and conversion will lie.

In Error to the Circuit Court of the United States for the Eastern District of Pennsylvania.

Ellery P. Ingham, for plaintiff in error.

N. Dubois Miller and Wm. H. Staake, for defendants in error.

Before ACHESON, Circuit Judge, and BUTLER and BUFFINGTON, District Judges.

BUTLER, District Judge. The action is in trespass, and it may be conceded that to sustain it the plaintiff must show a case which would justify a recovery in trover and conversion. On closing his testimony the defendants moved for and the court granted a nonsuit. That the plaintiff's statement of claims filed sets out a good cause of action in trover is admitted. In the defendants' brief it is said:

"Plaintiff's counsel fully recognizing the impossibility of bringing the cause of action in the case within any of the various subdivisions of trespass on the case ex delicto except trover, carefully framed their affidavit to hold to bail and their statement of claim so as to make a good cause of action in trover, and succeeded so well that the defendants having taken a rule to discharge on common bail, ACHESON, circuit judge, upon the argument of the rule, said: 'The allegations of fact contained in the plaintiff's affidavit and in his statement

of claim are to be taken as true, and giving due effect to them, we cannot say that a prima facie case of trover and conversion is not thereby disclosed.' Had the proof come up to the allegations the plaintiff would not have been obliged to bring his case to this court."

The oral admission made on the argument, was even more emphatic. The statement of claim is as follows:

"The plaintiff, Joseph K. Chew, a citizen of the state of New Jersey, residing in Salem, claim of the defendants, Henry S. Louchheim and Frederick Leser, citizens of the state of Pennsylvania, residing in Philadelphia, the sum of ten thousand dollars as damages upon the following cause of action:

"For that in February, A. D. 1892, and for a long time before and thereafter, the said Henry S. Louchheim and Frederick Leser were co-partners as bankers and brokers, under the name of Henry S. Louchheim & Company. That during the said month of February, A. D. 1892, said Joseph K. Chew procured the said Henry S. Louchheim and Frederick Leser to purchase for him for the purpose of investment a $1,000 bond of the Poughkeepsie Bridge Company for the sum of $652.50, for which the said Joseph K. Chew paid in full and which said bond, under a scheme of reorganization, was thereafter duly changed into 4 per cent. bonds of the Philadelphia, Reading & New England Railroad Company to the amount of $750 and Class B income bonds of the Philadelphia, Reading & New England Railroad Company to the amount of $370. That during the month of December, A. D. 1892, the said Henry S. Louchheim and Frederick Leser purchased for investment for and on behalf of the said Joseph K. Chew, three certificates representing respectively 38, 5 and 7 shares of the capital stock of the Bergner & Engel Brewing Company for the sum of $4,642.26. The said Joseph K. Chew then and there paid to the said Henry S. Louchheim and Frederick Leser for and on account of the same, the sum of $2,800 in cash and borrowed from the said Henry S. Louchheim and Frederick Leser at 6 per cent. interest per annum, the balance of $1,842.26, then due upon said certificates of stock, which said loan the said Henry S. Louchheim and Frederick Leser then applied to the payment of the said balance due. On January 18, 1893, said Joseph K. Chew paid to Henry S. Louchheim and Frederick Leser the sum of $700, with direction to purchase 4 per cent. and Class B income bonds of the Philadelphia, Reading & New England Railroad Company of the par value of $880 and to apply any balance remaining after said purchase toward payment of his said loan. On January 25, 1893, said Henry S. Louchheim and Frederick Leser purchased for investment for and on behalf of the said Joseph K. Chew 4 per cent. bonds of the Philadelphia, Reading & New England Railroad Company to the amount of $250 par value for the sum of $190.63 and Class B income bonds of the Philadelphia, Reading & New England Railroad Company to the amount of $630 par value, for the sum of $228.38. On March 15, 1893, the said Joseph K. Chew paid to the said Henry S. Louchheim and Frederick Leser the sum of $950, leaving a balance due them of $611.39, which by sundry payments and the collection and credits of dividends on the stock of the Bergner & Engel Brewing Company was reduced in the month of March, 1894, to the sum of $140.36. The said Henry S. Louchheim and Frederick Leser then and there having in their possession certificates representing 50 shares of the capital stock of the Bergner & Engel Brewing Company of the par value of $100 each and of the value of $5,000, and 4 per cent. bonds of the Philadelphia, Reading & New England Railroad Company in the sum of $1,000 and of the value of $1,000, and Class B income bonds of the Philadelphia, Reading & New England Railroad Company in the sum of $1,000 of the value of $400 as hereinbefore set out (the said certificates and bonds having been in the possession of the said Henry S. Louchheim and Frederick Leser a more particular description cannot be set out), which said bonds and certificates of stock were then and there left in the custody of the said Henry S. Louchheim and Frederick Leser for safe keeping. And the said Joseph K. Chew avers that although he duly demanded the said certificates and bonds and tendered the balance then due to the said Henry S. Louchheim and Frederick Leser, heretofore, to wit: in March, A. D. 1894, the said Henry S. Louchheim and Frederick Leser in

violation of law, rehypothecated said certificates, stock and bonds and caused the same to be sold and disposed of to satisfy certain indebtedness then due and owing by them, the said Henry S. Louchheim and Frederick Leser, and therein and thereby embezzled and converted to their own use said certificates, stock and bonds to the damage of said Joseph K. Chew $10,000."

The substance of the statement is that the defendants bought for the plaintiff certain bonds of the Philadelphia, Reading & New England Railroad Company (describing them with as much particularity as the circumstances allow) and 50 shares of stock in the Bergner & Engel Brewing Company, for which they took and held certificates; that the plaintiff furnished means, in advance, to pay a large part of the price, and subsequently paid nearly all the balance; that the object of the purchase was not speculation but investment; and that it was stipulated that the defendants should not part with or encumber the property, but safely hold it for the plaintiff, until the balance of purchase money should be paid; that the plaintiff subsequently tendered the balance and demanded possession of the property which demand was refused; and that the defendants wrongfully converted the property to their own use.

Were these allegations supported by the evidence—that is, might the jury have found them to be so supported? The motion for nonsuit was based on the assertion that there is no evidence of the purchase of certain, identified, bonds for the plaintiff, nor that certificates of stock were procured and held for him, as the statement alleges; and furthermore that if this were otherwise the plaintiff could not recover because he was not entitled to possession of the property at the time of the alleged conversion. The testimony describes the bonds with as much particularity as the circumstances allow, and as much as the statement does; and shows the defendants' admission that they had bought and were holding them for the plaintiff. As respects the stock certificates we think the evidence would have justified a finding that the defendants had procured and held them as claimed. It shows the defendants' written reports that they had purchased the stock; their repeated declarations that they had it, and were holding it for the plaintiff; that they had received dividends on it for him, and further that they had received several payments on account of the balance due for it. In the common course of dealing, certificates accompany the purchase of stock; they are the usual, if not the only evidence of purchase, transfer and title. It would seem clear therefore that the plaintiff was fully justified in understanding from the defendants' reports and declarations that they had, and were holding the stock for him, and that the jury would have been justified in finding this to be true. How could they have the stock, without having the certificates? What right had they to payments on account if they had not the certificates? Had the jury found, as it might, that the reports and declarations were virtual representations that the certificates had been procured and were held for the plaintiff, and that payments on account were thus obtained, it should have found the defendants to be estopped from denying the truth of the representations.