ZACHARY *vs.* PACE.

In trover, proof of demand and non-compliance is *prima facia* evidence of conversion:

But where the plaintiff demanded the goods of defendant, and he answered that he had no claim to them himself, but would not give them up until he ascertained to whom they belonged, and the proof showed that the property was in dispute, and defendant had reasonable grounds to doubt the title of plaintiff—HELD that the re-

fusal to surrender the goods under such circumstances was not sufficient evidence of conversion.

In trover it is not necessary for plaintiff to prove that the defendant was in possession of the goods at the commencement of the suit, for parting with possession is often evidence of conversion.

Abstract instructions to the jury are improper.

Where the court erroneously instructed the jury as to the law, but the instructions could not have influenced the verdict, a new trial will not be granted on that account.

Writ of Error to the Johnson Circuit Court.

TROVER, brought by Bartlett Zachary, Jr., against Alfred E. Pace, determined in the Johnson Circuit Court, in March, 1847, before SNEED, judge.

The declaration charged the defendant with the trover and conversion of certain writings obligatory, promissory notes, and receipts, the property of plaintiff. The cause was tried on a plea of not guilty, and verdict for defendant. Plaintiff moved for a new trial on the grounds that the verdict was contrary to evidence, and that the court instructed the jury erroneously; the court overruled the motion, and plaintiff excepted. From the plaintiff's bill of exceptions it appears:

John Rogers, a witness on the trial for the plaintiff, testified that he was the executor of Bartlett Zachary, Sr. That the plaintiff handed the instruments named in the declaration to John Zachary to give to Lemuel Wallace, who, together with E. W. Courtney and F. H. Arbough, had been selected as arbitrators to decide to whom they rightfully belonged, the witness claiming them as such executor, and plaintiff contending that they belonged to him. That said John Zachary handed all of said papers to said Wallace, and before arbitration could be had Wallace died, and that the next time he saw them they were in the hands of defendant Pace. Witness did not know who was the owner of said instruments: the amount due thereon was about $700.

James M. Hamilton testified that on the morning of old man Bartlett's sale, the plaintiff exhibited to him the instruments in question.

E. W. Courtney testified that, at a certain time in the lifetime of Bartlett Zachary, Sr., one Wicks, a constable, executed a receipt to said Zachary for a note, and, on handing him the receipt, he said it was not right: that the note belonged to plaintiff, and Wicks then drew a receipt for the note to plaintiff, which receipt was one of the instruments named in the declaration. On the Sunday before the old man died, witness made a schedule for him of some notes and papers, and he believed part of the instruments named in the declaration were the same, but could not say which, as he scheduled them from the backs, and did not read them.

Oglevie testified that, on the Sunday before Bartlett Zachary, Sr. died, he sent the plaintiff and one White to his (the old man's) house for the papers in controversy: the old man enquired several times if they had come? When they returned plaintiff wished the papers to be registered, or a memorandum made of them, so that if the old man died there should not be any "persecution" against him for keeping them. The notes were accordingly numbered, and a memorandum made by Dozier. Witness believed that the old man did not know what he was doing, he was in so much pain. He believed the notes in question were the same: two of them he knew to be, for they were on him. He saw the plaintiff have the notes afterwards, and he told witness to "keep it dark," and say nothing about it. Old man died on Wednesday after the Sunday spoken of.

William Adams testified that one of the notes in controversy was executed by him to Bartlett Zachary, Sr.

Another witness testified that one of the notes was executed by him to the old man.

W. S. Swigart and Marion B. Street testified that, in January (then) last, they heard plaintiff demand of defendant the instruments named in the declaration, and defendant said that he had no claim to said papers, and would not give them up until he ascertained who they belonged to This is the substance of all the evidence contained in the bill of exceptions.

SNEED. J., instructed the jury as follows: "This is an action of

trover and conversion brought by the plaintiff against the defendant for the recovery of some evidences of debt. It requires several things on the part of the plaintiff before he can recover: 1st. It is necessary that the plaintiff prove property in himself: 2d. That the property was in the possession of the defendant: 3d. A demand and refusal is necessary, or that a conversion has been made by the defendant. If you find all the foregoing requisites proven, then you will next ascertain the value of the notes. If the notes were placed in the hands of Wallace, who is represented by Pace, the defendant, as Wallace's administrator, by the plaintiff Zachary, and the executor (Rogers) of B. Zachary, deceased—if it was done jointly for the purpose of Wallace retaining the same until the title could be settled, then Wallace, nor his representative, would be bound to re-deliver until they were demanded by the parties who placed them in his hands.

"If plaintiff had the possession of the papers, this is enough against one who has no better title; but if it turns out that the notes are the property of Rogers, and not the property of plaintiff, you will find for the defendant. It is not sufficient to prove a conversion that the defendant wished to know to whom the property or choses in action belonged: a refusal will not be sufficient when it is upon condition. If the plaintiff demands the goods, and the defendant answers that he has no claim to the goods, but wishes to be satisfied whose goods they are before he gives them up, it is not a sufficient conversion."

LINTON & BATSON, for plaintiff in error.

JOHNSON, C. J. The correctness of the decision of the circuit court in overruling the motion for a new trial is the question to be determined. It was proved upon the trial that the plaintiff demanded the property described in the declaration before the institution of this suit. Upon the demand being made the defendant did not expressly and positively refuse to deliver the property to the plaintiff, but remarked that he had no claim to

it, yet he would not give it up until he ascertained to whom it belonged. This is believed to be equivalent to saying that he made no pretence of claim to the property himself, and that he would deliver it to the plaintiff in case he could become satisfied he was entitled to it. If this is the legal import of his answer, then it is clear that he did not make a positive, but a qualified, refusal. The first point to be adjudicated, therefore, is as to the effect of such a refusal in furnishing evidence of a conversion. It is laid down in 1st Chitty's Pleadings, at p. 155, that "a demand and a non-compliance are prima facia evidence of a conversion, and will induce a jury to find it, unless the defendant adduce evidence to negative the presumption, as that he being a carrier, &c., lost the goods by negligence, &c., or that he has reasonable grounds for doubting the plaintiff's right, and offered to deliver them to the right owner. A reference is there made to 3 *Camp.* 215, and 2 *Bulst.* 310. The case referred to in 3 *Campbell* is *Green vs. Dunn.* It was trover for timber, which the defendant found on his premises, and which had been deposited there by the permission of the former occupier. The plaintiff, to whom the timber belonged, having demanded it of the defendant, the latter said: "If you will bring any one to prove it is your property, I will give it to you, and not else." Lord ELLENBOROUGH, in delivering the opinion of the court, said: "This is a qualified refusal, and no evidence of conversion." It will be conceded that it is not said, in so many words, that the defendant must have reasonable grounds to doubt the plaintiff's right, yet the rule is most clearly subject to that restriction, and the facts of that case were fully sufficient to raise such doubts. The principle being thus ascertained, it now remains to be seen whether the facts developed here are of such a character as to bring this case within its operation. It appears, from the testimony, that there was a contest going on in respect to the right of property in the instruments described in the declaration, and that three persons had been selected as arbitrators to determine the matter, that the notes and receipts had all been delivered to Wallace, one of the arbitrators, by the plaintiff, for the purpose

of being acted upon; that Wallace died before the arbitration was had, and that they fell into the hands of Pace, the defendant. They were claimed by John Rogers, as the executor of Bartlett Zachary, and by the plaintiff in his own right. It is not shown by the testimony how the defendant became possessed of the property, and all that is said in respect to him is that he did not pretend to set up any claim, but refused to deliver it up until he could ascertain to whom it belonged. We consider the facts of the case fully sufficient to raise a reasonable and well-grounded doubt in the mind of the defendant in regard to the right of the plaintiff, and that therefore his refusal, qualified as it was, can furnish no evidence of a conversion. The conversion, being of the very gist of the action and the only injury of which the plaintiff complains, and there being no sufficient evidence of such conversion, the plaintiff necessarily failed in his proof, and was not entitled to recover.

After the testimony was closed the court gave the jury sundry instructions. The second instruction is, that it was necessary for the plaintiff to prove that the property was in the possession of the defendant. If this instruction pointed to the time of the commencement of the suit, it was clearly wrong, as the suit is not for the thing itself, but for damages commensurate with its value, and in many cases the parting with the possession is the very fact upon which the plaintiff relies to establish a conversion.

The court also instructed the jury that if the notes were placed in the hands of Wallace, and that they fell into the hands of Pace as his administrator, and that they were placed there jointly by the plaintiff, Zachary, and Rogers, the executor of B. Zachary, deceased, in order that Wallace might retain them until the title could be settled, that neither Wallace, nor his representatives, would be bound to re-deliver them until they were demanded by the parties by whom they were so delivered. This the court had no authority to give, as it simply involved an abstract principle of law. There was no evidence tending to prove

that Pace was the administrator of Wallace, or that he received the notes and papers by virtue of any such authority.

The last instruction is, that it is not sufficient to prove a conversion, that the defendant wished to know to whom the property belonged, and that a refusal is not sufficient when it is made upon a condition. That if a plaintiff demands goods, and the defendant answers that he has no claim to them, but wishes to be satisfied to whom they belong before he gives them up, it is not sufficient evidence of a conversion. The principle enunciated by this instruction was incidentally discussed whilst commenting upon the force and effect of the testimony. It is believed that it is not sufficient of itself to re-but the presumption of a conversion that the defendant made a conditional, or qualified refusal, but that the reason of the law requires also that the case should develop such a state of facts as to afford reasonable ground to doubt the plaintiff's title. The instruction is, therefore, erroneous in not going to the extent indicated. If a mere qualified refusal were admitted as conclusive evidence to re-but the presumption of a conversion, and no facts or circumstances were required upon which to predicate the defendant's doubts, it would place it in his power in every case to defeat the action unless the plaintiff should be prepared to prove an actual conversion.

The court also gave other instructions: all of which are believed to be substantially correct. We are, therefore, of opinion that, although the court erred in point of law, in giving some of the instructions, yet, as those instructions could not have had any influence upon the verdict of the jury, they ought to be wholly disregarded, and the judgment affirmed.

The judgment of the court below is affirmed.